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In the
Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, *Petitioner*,

vs.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI, AND NOTE OF ARGUMENT.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, Respondents.

WOODYARD PRINTERS, CHARLESTON, W. VA.

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OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI.

Come now the Owens-Illinois Glass Company, a corporation and Libbey-Owens-Ford Glass Company, a corporation, respondents herein, by their counsel, and here move the Court to dismiss the writ of certiorari heretofore granted herein on October 12, 1936, upon the grounds that the questions presented herein at this time are moot, and that by reason of the change in the circumstances of the parties, and especially of the property of the petitioner, no relief can ulti-

mately be granted the petitioner in the pending litigation to which said writ applies.

And as grounds for said motion, and in support of the same, these respondents now aver the following facts and transactions which have occurred since the entry of the final order of the Circuit Court of Appeals herein, since the granting of the writ of certiorari by this Court, and since the docketing of the said writ for hearing at the present term, to-wit:

Respondents aver that on August 10, 1936, the Circuit Court of Kanawha County, West Virginia, entered a decree in the chancery cause of John B. Bell and Commonwealth Gas Corporation vs. Wayne United Gas Company et al., No. 11,668, pursuant to the mandate of the Supreme Court of Appeals of West Virginia upon the appeal of said cause theretofore taken to said Court, by which decree of August 10, 1936, said Circuit Court amended and supplemented the decree of sale theretofore entered by it in said cause on July 13, 1934, and thereupon directed the special commissioners appointed by said original decree of sale to proceed thereunder and make sale of the properties of the Wayne United Gas Company therein decreed to be sold, which properties consisted of all the properties of said company located in the State of West Virginia. Said company owns no other properties except certain gas rights and properties in the State of Kentucky, which are of relatively small value. Said Kentucky properties are chiefly, if not entirely, subject to the first mortgage of said company, and proceedings are pending in the courts of Kentucky for the sale of said properties under the said mortgage. Respondents aver that all said Kentucky properties are worth considerably less than $50,-

000, the total income thereof, from June 21, 1932, to November 19, 1936, having been less than $22,000, while the income of the West Virginia properties for the same period was approximately $800,000. A certified copy of said decree of August 10, 1936, is herewith filed as part of this motion, marked "Exhibit A."

That the Bank of New York & Trust Company, Trustee, the Chemical Bank & Trust Company, Edward F. Moore, Commonwealth Gas Corporation, Wallace G. Berlin, Wert D. Brougher, Robert H. Conlyn, Anna A. Hays, Ellinor B. Hays, Katherine E. Morrison, Philip L. Morrison, Glenn N. Todd, Francis A. Waterhouse and Gertrude Remler Tracy filed their petition with the Supreme Court of Appeals of West Virginia for an appeal from said decree of August 10, 1936, which appeal was, by said Court, denied by its order entered on the 9th day of November, 1936.

That on October 1, 1936, said special commissioners, having duly advertised the sale of said properties under said decree of sale, as amended and supplemented as aforesaid, made sale of the same at public auction as provided by said decree, at which sale H. G. Phillipps became the purchaser of all of said property at the price of $1,225,500; which sale was duly reported to said Circuit Court by said special commissioners on October 3, 1936. Exceptions to said sale were filed by said Bank of New York & Trust Company, Trustee, and others, including said Wayne United Gas Company, on October 14, 1936, which exceptions were duly heard, and on December 2, 1936, said Circuit Court of Kanawha County overruled the said exceptions and confirmed the said sale. Certified copies of the orders of said Court entered on October 3, 1936, filing the report of said sale, on October 14,

1936, filing the exceptions to said report, and on December 2, 1936, confirming said sale, are hereto annexed as parts of this motion, marked, respectively, "Exhibit B," "Exhibit C," and "Exhibit D." True copies of said exceptions and of the stipulation filed therewith are likewise annexed hereto, marked "Exhibit C-1" and "Exhibit C-2."

That on December 21, 1936, by decree then made and entered, said Circuit Court fixed the amounts of certain allowances to be paid out of the purchase money arising from said sale, and directed the special commissioners to collect the said purchase money and deliver deed to the purchaser, or his nominees, and on December 21, 1936, said special commissioners, pursuant to the said decree, executed and delivered to Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, as nominees of said H. G. Phillipps, a deed of conveyance for all the said properties of Wayne United Gas Company sold by them under decree of said Circuit Court as aforesaid, and said grantees have accepted the said deed and have taken said properties into their possession. A certified copy of said decree of December 21, 1936, is herewith filed as part of this motion, marked "Exhibit E," and a true copy of said deed of conveyance is likewise filed as part of this motion, marked "Exhibit F."

A certified copy of the final order of said Supreme Court of Appeals of West Virginia, entered on the 21st day of May, 1935, upon appeal from the decree of sale entered by said Circuit Court of Kanawha County on July 13, 1934, as well as the orders of said Supreme Court of Appeals refusing a rehearing of said final order, are filed herewith as parts of this motion, marked "Exhibit G;" and a certified copy of the order of said Supreme Court of Appeals entered

on November 9, 1936, refusing an appeal from said order of the Circuit Court of Kanawha County entered on August 10, 1936, is herewith filed as part of this motion, marked "Exhibit H."

That under the laws of the State of West Virginia any party aggrieved by a final or appealable decree of said Circuit Court of Kanawha County may, within eight months from the entry of such decree, present a petition to the Supreme Court of Appeals of said State for an appeal from such decree, and the appeal so prayed for may be granted or denied in the discretion of said Supreme Court of Appeals.

Wherefore, these respondents aver that all title and interest in said West Virginia properties have passed from said Wayne United Gas Company, and by reason thereof no reorganization of said company can be had in the manner proposed by it in its several petitions filed in this bankruptcy proceeding or otherwise; and that said proceeding is therefore moot and without avail to benefit the petitioner in any manner.

These respondents therefore respectfully pray that the writ of certiorari heretofore granted herein on October 12, 1936, may be dismissed, with costs to these respondents, and for such other, further and general relief as the case may require.

OWENS-ILLINOIS GLASS COMPANY
LIBBEY-OWENS-FORD GLASS COMPANY
By Counsel.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Respondents.

STATE OF OHIO,
COUNTY OF LUCAS, TO-WIT:

H. G. Phillipps, a credible person, being duly sworn, upon oath says that he is Vice-President of Owens-Illinois Glass Company, one of the respondents named in the foregoing motion, and is familiar with the contents thereof; that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information and belief, and that so far as they are therein stated to be upon information, he believes them to be true.

H. G. PHILLIPPS.

Taken, subscribed and sworn to before me in my said county, this 30th day of December, 1936, as witness my hand and official seal.

(NOTARIAL SEAL) HELEN G. MYERS,
Notary Public for Lucas County, Ohio.

My commission expires August 25, 1937.

EXHIBIT A.

(STATE OF WEST VIRGINIA,
At a Circuit Court of Kanawha County held at the Court House thereof on the 10th day of August, 1936.)

JOHN B. BELL and)
COMMONWEALTH GAS CORPORATION,)
a Corporation,)
vs.) IN CHANCERY
) No. 11,668
WAYNE UNITED GAS COMPANY,)
a Corporation,)
THE CHASE NATIONAL BANK OF)
THE CITY OF NEW YORK, a)
Corporation, *Trustee*, and)
PAUL C. BEARDSLEE, *Trustee, et als.*)

SUPPLEMENTAL DECREE OF SALE

The Court, having maturely considered the mandate of the Supreme Court of Appeals heretofore certified to this Court, the evidence and all the record heretofore taken and filed herein, the several matters arising upon the submission of this cause by the order entered herein on the 28th day of July, 1936, and the arguments of counsel thereon, is of opinion, and doth accordingly find and decree, for reasons stated in writing and now ordered to be filed as part of the record herein, marked "COURT'S FINDING PURSUANT TO MANDATE OF SUPREME COURT," that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company did not breach the gas purchase contract between them and the Wayne United Gas Company, dated the 5th day of June, 1929, mentioned and described in the proceedings herein, nor did either of said Glass Com-

panies breach the same, during the period covered by the evidence taken herein, namely, between the date of the making of said contract and the 1st day of January, 1934; and the Court is further of opinion that no amount is due from said Glass Companies, or either of them, to the Wayne United Gas Company or to the receivers of said company for additional gas which said Glass Companies should have taken or paid for under said contract during the period above mentioned.

It is, therefore, ordered, adjudged and decreed that the several intervening petitions heretofore filed herein by the Bank of New York and Trust Company, the Chemical Bank and Trust Company, Edward F. Moore and Commonwealth Gas Corporation, and by Wallace G. Berlin, et al., in so far as the same ask for a determination of the amount due from said Glass Companies by reason of the breach of said contract, or for natural gas which said companies should have taken or paid for during the period aforesaid, as well as the several motions of the same parties made for the same purpose, be and the same are hereby denied and overruled, and that said respective petitions and motions be and stand dismissed as heretofore decreed; and that the said defendants in said petitions recover their costs in and about their behalves in this cause expended in resisting said petitions; to which action of the Court in finding and decreeing as aforesaid the said Bank of New York and Trust Company, Trustee, The Chemical Bank and Trust Company, Edward F. Moore and Commonwealth Gas Corporation, and Wallace G. Berlin, et al., objected and excepted.

And in accordance with the findings and this decree and the decrees herein made, upon motion of Messrs. Brown,

Jackson and Knight, attorneys for the defendants, The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustee under the First Mortgage, dated June 1, 1929, of Wayne United Gas Company, it is further ordered, adjudged and decreed that the decree of sale heretofore entered in this cause on the 13th day of July, 1934, be and the same is hereby amended and supplemented (pursuant to authority reserved in Article XXI of said decree) in Subdivision V, Lot One, of Article IV of said decree, so that the second paragraph of said Subdivision shall read as follows:

"The Company's interest in said contract includes every right and claim to moneys becoming or which may have become due or payable under said contract, and remaining unpaid at the time of the delivery of possession of the property included in this Lot One as in this decree provided."

It is further ordered, adjudged and decreed that said decree of sale heretofore entered in this cause on the 13th day of July, 1934, be amended and supplemented by changing the advertisement of sale annexed to said decree of sale as Schedule A, by inserting an appropriate reference to this order and making appropriate changes in the dates included in said Schedule A.

It is further ordered, adjudged and decreed that H. Rummel Anderson and Thomas B. Jackson, heretofore appointed as Special Commissioners for the purpose, do proceed under said decree of July 13, 1934, to make sale of the properties therein decreed to be sold, in all respects as therein provided, except as in this decree amended and supplemented, and to perform and carry out all the provisions of said former decree of sale.

The Wayne United Gas Company suggests, upon the record, that it, as Debtor, heretofore filed its petitions in the District Court of the United States for the Southern District of West Virginia, praying, among other things, that said District Court find that its said petitions comply with Section 77-B of the Bankruptcy Act of the United States (providing for corporate reorganization), and the same filed in good faith, and praying said District Court to approve the same as properly filed under said section of said Act, and for all such other and further relief to which said Debtor may be entitled; that said petitions were disapproved and dismissed by said District Court by two decrees, the last of said decrees having been entered on the 28th day of May, 1936; that an appeal was allowed by said District Court on the 11th day of June, 1936, with supersedeas, from the said decree entered on the 28th day of May, 1936, to the United States Circuit Court of Appeals for the Fourth Circuit; that the transcript of the record upon such appeal was filed in said United States Circuit Court of Appeals for the Fourth Circuit on the 30th day of June, 1936, and the cause on that day docketed; that a motion was made by the Glass Companies on the said 30th day of June, 1936, in the United States Circuit Court of Appeals for the Fourth Circuit, to dismiss the appeal allowed by said District Court on the said 11th day of June, 1936, nd that the said United States Circuit Court of Appeals, on the 4th day of July, 1936, dismissed said appeal; that the said Wayne United Gas Company intends to file in the Supreme Court of the United States a petition for certiorari, as provided by the statutes of the United States in such cases made and provided, and in accordance with the rules of the Supreme Court of the United States; and that an order was filed in the said United States Circuit Court of Appeals for the Fourth Circuit, on the 28th

day of July, 1936, staying the mandate of said United States Circuit Court of Appeals for the Fourth Circuit, pending the application of the Wayne United Gas Company, as appellant, in the Supreme Court of the United States for a writ of certiorari to said United States Circuit Court of Appeals for the Fourth Circuit, unless otherwise ordered by said United States Circuit Court of Appeals, or the said Supreme Court of the United States, providing said application is filed in said Supreme Court of the United States within thirty (30) days from said 28th day of July, 1936. And because of such suggestion upon the record, said Wayne United Gas Company moved the Court to direct the Special Commissioners, H. Rummel Anderson and Thomas B. Jackson, appointed as such by the decree entered herein on the 13th day of July, 1934, to make sale of the property therein decreed to be sold, to take no proceedings thereunder, or hereunder, until the Supreme Court of the United States has acted upon the movant's application for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, for a review of said order of dismissal entered on the 4th day of July, 1936; to which suggestion the Glass Companies and the above named Trustees objected, and the same parties resisted the said motion. And the Court, having maturely considered said motion, is of opinion to overrule the same, and doth accordingly so adjudge, order and decree. To which action of the Court in overruling its said motion, the said Wayne United Gas Company objected and excepted.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX, *Clerk Circuit Court,*
Kanawha County, West Virginia.

(SEAL)

STATE OF WEST VIRGINIA,
KANAWHA COUNTY, TO-WIT:

I, A. P. HUDSON, sole judge of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, do certify that M. H. Hix, by whom the aforesaid record and certificate were made and given, and who in his own handwriting has thereunto subscribed his name and has thereto affixed the seal of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, was at the time of so doing, and now is Clerk of said Circuit Court in and for said County, to all whose acts as such full faith and credit are due and given, and that the said record and certificate are in due form and made by the proper officer.

In testimony whereof, I have hereunto set my hand this fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-six.

A. P. HUDSON,
Judge of the Circuit Court of
Kanawha County, West Virginia.

STATE OF WEST VIRGINIA,
KANAWHA COUNTY, TO-WIT:

I, M. H. HIX, Clerk of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, do hereby certify that the Honorable A. P. Hudson, by whom the foregoing certificate was made and given, and who in his own proper handwriting has thereunto subscribed his name, was at the time of so doing, and now is sole Judge of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, duly commissioned and qualified, to all whose acts as such full faith and credit are due and given as well as in court of adjudicature as elsewhere.

In testimony whereof, I have hereunto set my hand and seal of said Circuit Court, this 14th day of December, A. D. 1936.

M. H. HIX,
Clerk of Circuit Court of
Kanawha County, West Virginia.

(SEAL)

EXHIBIT B.

(STATE OF WEST VIRGINIA,

At a Circuit Court of Kanawha County held at the Court House thereof on the 3rd day of October, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, and PAUL C. BEARDSLEE, *Trustee*.	)	

This 3rd day of October, 1936, came H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, heretofore appointed in this cause, pursuant to the terms of Article XVI of a decree of this Court, entered the 13th day of July, 1934, and came also the plaintiffs, by counsel, and the defendants, The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustees under the first mortgage of Wayne United Gas Company, dated June 1, 1929, by counsel; Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company by counsel; and petitioners, The Bank of New York and Trust Company, Trustee, et als. and Wallace G. Berlin, et als., by counsel. Thereupon said Special Commissioners tendered their report of sale which is ordered filed, and counsel for said The Bank of New York and Trust Company, Trustee, et als. and Wallace G. Berlin, et als. announced to the Court their intention of filing objections and exceptions to said report of sale

and moved the Court to allow them time within which to file said objections and exceptions; upon consideration of which, it is adjudged, ordered and decreed that this cause be, and the same is hereby continued to the 14th day of October, 1936, at 12:00 o'clock noon within which time said parties may file such objections and exceptions, and for a hearing upon said report and said objections and exceptions and all other matters arising upon said report of sale or otherwise coming before the Court in this cause.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT C.

(STATE OF WEST VIRGINIA,
At a Circuit Court of Kanawha County held at the Court House thereof on the 14th day of October, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, PAUL C. BEARDSLEE, *Trustee*.	)	

This cause came on this 14th day of October, 1936, to be further heard, pursuant to the order entered herein on the 3rd day of October, 1936, and thereupon came The Bank of New York & Trust Company, Trustee, et al and the Wayne United Gas Company, by Blue, Dayton & Campbell and Price, Smith & Spilman, their attorneys, and tendered and asked leave to file their written objections to the confirmation of the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, to H. G. Phillips, on the 1st day of October, 1936, of those certain properties of the said Wayne United Gas Company, referred to as Parcel C in the report of sale heretofore made by said Special Commissioners and filed in this cause, for the reasons and upon the grounds as set forth in said written objections, which written objections, for identification, are marked "Objections of The New York Bank & Trust Company et als and Wayne United Gas Company to Confirmation of Special Commis-

sioners' Sale Made October 1, 1936" and the said The Bank of New York & Trust Company, Trustee, et al, and the Wayne United Gas Company also tendered and asked leave to file a certain written stipulation and agreement made and signed by The Bank of New York & Trust Company, Wayne United Gas Company et al, by Blue, Dayton & Campbell, their attorneys, Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, by H. D. Rummel, their attorney, and The Chase National Bank of the City of New York, and Paul C. Beardslee, Trustees, by Thomas B. Jackson, their attorney, dated October 14, 1936, which stipulation and agreement, for identification, is marked "Stipulations. October 14, 1936." And thereupon leave to file the said objections to the confirmation of the aforesaid sale, and the said stipulation and agreement of the aforesaid parties was, and the same is hereby, given, and said objections and said stipulations, marked for identification as aforesaid, and each of them, were ordered to be filed, and the same accordingly are filed: And thereupon Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, by H. D. Rummel, their attorney, and The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustee, by Thomas B. Jackson, their attorney, moved the Court to confirm the aforesaid sale made by said Special Commissioners, H. Rummel Anderson and Thomas B. Jackson, to H. G. Phillips, on the 1st day of October, 1936, and to approve and confirm the report of said Commissioners heretofore filed by them.

And the Court, after having heard the arguments of counsel upon the aforesaid objections to the confirmation of the aforesaid sale and upon the aforesaid motion for con-

firmation of the said sale, takes time to consider of its order or decree in respect thereof.

This order to be entered as of the 14th day of October, 1936.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT C-1.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation, *Plaintiffs,*	)	
v.	)	IN CHANCERY No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee,* and PAUL C. BEARDSLEE, *Trustee, et als,* *Defendants,*	)	

The New York Bank & Trust Company et al and the Wayne United Gas Company object to the confirmation of the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, to H. G. Phillips, on the 1st day of October, 1936, of those certain properties referred to as Parcel C, in their report of sale heretofore filed in this cause, for the following reasons and upon the following grounds:

(1) That the Supreme Court of the United States on the 12th day of October, 1936, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in the proceeding of *Wayne United Gas Company, a corporation, petitioner, v. Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C.*

Beardslee, Trustees, respondents, October Term, 1936, No. 305, to review a decree of said Circuit Court of Appeals entered in said proceeding on the 4th day of July, 1936, dismissing the appeal of said Wayne United Gas Company from an order of the District Court of the United States for the Southern District of West Virginia, made on the 28th day of May, 1936, dismissing the Original Petition, Amended and Supplemental Petition, and Second Amended and Supplemental Petition of said Wayne United Gas Company, filed in said District Court, for reorganization of Wayne United Gas Company under Section 77B of the Bankruptcy Act. A printed copy of the transcript of the record of the said proceeding in the Supreme Court of the United States is this day filed with the papers in this cause, marked for identification "Exhibit Transcript of Record."

That H. G. Phillips, the highest bidder for the property offered for sale, as Parcel C, at the said sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, on the 1st day of October, 1936, and as reported by said Commissioners, is Vice-President of the Owens-Illinois Glass Company, and that his bid was made for the defendants, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company.

(2) That The Bank of New York & Trust Company, as Trustee, and others, presented to, and filed their petition in, the Supreme Court of Appeals of West Virginia, on the 29th day of September, 1936, praying therein for an appeal from and supersedeas to the decree entered by the Circuit Court of Kanawha County, on the 10th day of August, 1936, a copy of which petition is filed with the papers in this cause in the office of the Clerk of said Circuit Court: That

the said Supreme Court of Appeals has not, as of this 14th day of October, 1936, announced its action upon said petition.

(3) That the sum of $1,225,500.00, the bid of said H. G. Phillips, is inadequate as will appear from the record in this cause, including the fact that there is in the hands of the Special Receivers, heretofore appointed by this Court, in cash, the sum of $546,726.02; and that the said Special Receivers have receivables due to them, for gas delivered to the aforesaid two Glass Companies, as of October 14, 1936, the approximate sum of $18,000.00. That said cash and receivables, less the costs of this suit and such allowances as the Circuit Court of Kanawha County shall make, are included in the aforesaid Parcel C.

Respectfully submitted,

THE NEW YORK BANK & TRUST COMPANY,
WAYNE UNITED GAS COMPANY, *et al.*,
Petitioners

By BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Their Attorneys.

October 14, 1936.

EXHIBIT C-2.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation, *Plaintiffs*,	)	
v.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, and PAUL C. BEARDSLEE, *Trustee, et als*, *Defendants*,	)	

It is stipulated and agreed between the parties hereto as follows:

(1) That the Supreme Court of the United States on the 12th day of October, 1936, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in the proceeding of *Wayne United Gas Company*, a corporation, petitioner, v. *Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, respondents, October Term, 1936*, No. 305, to review a decree of said Circuit Court of Appeals entered in said proceeding on the 4th day of July, 1936, dismissing the appeal of said Wayne United Gas Company from an order of the District Court of the United States for the Southern District of West Virginia, made on the 28th day of May, 1936, dismissing the Original Petition, Amend-

ed and Supplemental Petition, and Second Amended and Supplemental Petition of said Wayne United Gas Company, filed in said District Court, for reorganization of said Wayne United Gas Company under Section 77B of the Bankruptcy Act. A printed copy of the transcript of the record of said proceeding in the Supreme Court of the United States is attached hereto, marked "Exhibit Transcript of Record."

(2) That H. G. Phillips, the highest bidder for the property offered for sale as Parcel C, at the sum of $1,225,500.00, at the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, on the 1st day of October, 1936, and as reported by said Commissioners to the Circuit Court of Kanawha County, is Vice-President of the Owens-Illinois Glass Company, and that his bid was made for the defendants, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company.

(3) That The Bank of New York & Trust Company, as Trustee, and others, presented to, and filed their petition in, the Supreme Court of Appeals of West Virginia on the 29th day of September, 1936, praying therein for an appeal from and supersedeas to the decree entered by the Circuit Court of Kanawha County on the 10th day of August, 1936, a copy of which petition is filed in the office of the Clerk of the Circuit Court of Kanawha County with the papers in the cause styled in the caption hereof. That said Supreme Court of Appeals has not, as of this 14th day of October, 1936, announced its action upon said petition.

(4) That there is in the hands of the Special Receivers appointed by the Circuit Court of Kanawha County by a

decree heretofore entered in the suit styled in the caption hereof, the cash sum of $546,726.02; and that the said Special Receivers have receivables due to them, for gas delivered to the aforesaid two Glass Companies, as of October 14, 1936, the approximate sum of $18,000.00. That said cash and receivables, less the costs of this suit and such allowances as the Circuit Court of Kanawha County shall make, are included in the aforesaid Parcel C.

(5) In making the foregoing stipulations, the Owens-Illinois Glass Company, the Libbey-Owens-Ford Glass Company, and the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, do not admit the competency or relevancy of any of the facts so stipulated, or waive any objection thereto, but make this stipulation solely for the purpose of obviating the proof, or offer of proof thereof by the undersigned petitioners.

THE BANK OF NEW YORK & TRUST COMPANY,
WAYNE UNITED GAS COMPANY, *et al*,
Petitioners,

By BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Their Attorneys,

OWENS-ILLINOIS GLASS COMPANY,
LIBBEY-OWENS-FORD GLASS COMPANY
By H. D. RUMMEL,
Their Attorneys,

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and PAUL C. BEARDSLEE, *Trustees*,
By THOMAS B. JACKSON,
Their Attorneys.

October 14, 1936.

EXHIBIT D.

(STATE OF WEST VIRGINIA,

At a Circuit Court of Kanawha County held at the Court House thereof on the 2nd day of December, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, PAUL C. BEARDSLEE, *Trustee, et als.*	)	

The Court having maturely considered the report of sale of H. Rummel Anderson and Thomas B. Jackson, heretofore appointed Special Commissioners in this cause, under a decree of sale entered the 13th day of July, 1934, which said report of sale was filed herein the 3rd day of October, 1936, and the objections filed thereto by The Bank of New York and Trust Company, Trustee, et als, and by the defendant, Wayne United Gas Company, and it appearing to the Court that the sale of the property mentioned and described, and reported as sold, in said report of sale, was duly made and had pursuant to the terms and provisions of said decree of sale, as amended and supplemented by a certain supplemental decree of sale entered in this cause the 10th day of August, 1936; that the bid made and offered for sale Parcel C, as mentioned and described in said report of sale, is fair and adequate; that the petition for an appeal

filed by said The Bank of New York and Trust Company, Trustee, and others in the Supreme Court of Appeals of West Virginia, as mentioned and described in section (2) of said objections, was refused by said Court on the 9th day of November, 1936; and that said report of sale conforms in every respect to the requirements of said decree of sale, as amended and supplemented, as aforesaid, it is therefore,

ADJUDGED, ORDERED AND DECREED, as follows:

(1) The said objections of said The Bank of New York and Trust Company, et als and of Wayne United Gas Company are hereby overruled.

(2) Said Report of sale is hereby ratified, approved and confirmed.

(3) In accordance with Article XVII of said decree of sale:

(a) H. G. Phillips, the purchaser of said Sale Parcel C, as reported in said report of sale, or his assignee, shall pay the amount bid by him for said Sale Parcel C, to-wit, the sum of One Million Two Hundred and Twenty-Five Thousand Five Hundred Dollars ($1,225,500.00) within twenty (20) days after the date of this decree.

(b) Said H. G. Phillips, having deposited the sum of Twenty-Two Thousand Dollars ($22,000.00) in cash with said Special Commissioner, pursuant to Paragraph 1 of Article XIV of said decree of sale, which said sum of Twenty-Two Thousand Dollars ($22,000.00) is to be credited on the purchase price of said Sale Parcel C under the terms

of Paragraph 8 of said Article XIV of said decree of sale, or his assignee, shall make such further cash payment or payments on account of the purchase price of said Sale Parcel C as shall be sufficient, together with the amount of any such deposit, to pay in full the sum of Twenty-Five Thousand Five Hundred Dollars ($25,500.00) (being the proceeds of Sale Parcel B as hereinafter determined) plus the items specified in sub-divisions First, Second and Third of Paragraph 1 of Article XIX of said decree of sale, and shall be entitled either to pay the balance of the bid of said H. G. Phillips in cash or to satisfy or make good such balance in whole or in part by turning in to said Special Commissioners to be credited at their distributive value, as determined under Paragraph 3 of said Article XVII, First Mortgage Bonds of said Wayne United Gas Company in bearer form, entitled to payment out of the proceeds of sale of Sale Parcel A, as mentioned and described in said report of sale.

(c) The Court reserves a paramount lien and charge upon the property contained in said Sale Parcel C, as set out in Paragraph 4 of said Article XVII.

(4) In accordance with Article XVIII of said decree of sale:

(a) Upon payment of the purchase price by said H. G. Phillips, or his assignee as aforesaid, or so much thereof as may be required to be paid in cash and upon making provision for any balance due, as provided in this decree, said Special Commissioners shall execute and deliver a deed or deeds and other instrument or instruments conveying or assigning and transferring to said H. G. Phillips, or his assignee, the property included in said Sale Parcel C.

(b) The Chase National Bank and Paul C. Beardslee, as Trustees under the First Mortgage of said Wayne United Gas Company, shall by way of further assurance, join with said Special Commissioners in the execution of said deed or deeds and other instrument or instruments, and shall thereby release and quit-claim to said H. G. Phillips, or his assignee, all their right, title and interest, as Trustees as aforesaid, in and to the property included in said Sale Parcel C.

(c) Ross B. Thomas and Herman Bennett, heretofore appointed as Special Receivers in this cause, shall, by way of further assurance, join with said Special Commissioners in the execution of said deed or deeds and other instrument or instruments, and shall thereby convey, transfer, assign and release to the said H. G. Phillips, or his assignee, all their right, title and interest, as such receivers, in and to the property included in said Sale Parcel C.

(5) In accordance with Article XIX of said decree of sale the proceeds of sale of said Sale Parcel C and cash held by the Trustee under said First Mortgage shall be applied as prescribed under said Article XIX.

(6) In accordance with Article XX of said decree of sale, in case the proceeds of the sale of the property by said decree of sale directed to be sold, together with the cash in the hands of said Chase National Bank, as Trustee under said First Mortgage, shall not be sufficient, when applied in accordance with the provisions of said decree of sale and of the order or orders hereafter to be made and of any order or decree made in the ancillary suit in this cause, pending in the Circuit Court of the 37th District of the County of Morgan, State of Kentucky, which may be made with respect

to the proceeds of sale of the property under the jurisdiction of said Kentucky Court, to pay in full the amount in Paragraph 8 of Section A of Article III of said decree of sale found to be due and payable in respect of said First Mortgage Bonds for principal and interest, with interest on said amount from the date of said decree of sale to the date fixed for payment at the rate of 6½% per annum, then said Special Commissioners shall report to the Court the amount of any such deficiency and said Trustees shall have judgment against said Wayne United Gas Company for the amount of such deficiency.

(7) Said Special Commissioners shall in all other respects comply with the terms of said decree of sale respecting action to be taken by them subsequent to this decree confirming said sale.

(8) The proceeds of the sale of Sale Parcel A are hereby determined to be One Million Two Hundred Thousand Dollars ($1,200,000.00), and the proceeds of the sale of Sale Parcel B are hereby determined to be Twenty-Five Thousand Five Hundred Dollars ($25,500.00).

(9) This cause shall be and the same is hereby continued to the 8th day of December, 1936, at 10:30 o'clock A. M. for a hearing to determine the amounts to be paid from the proceeds of the sale on account of the compensation and expenses of the Special Commissioners, the compensation and expenses of the Receivers in this cause and their counsel and the compensation and expenses of the Trustees under the First Mortgage and their counsel and to determine the respective amounts thereof to be apportioned and charged against the proceeds of sale of Sale Parcels A and B,

respectively, and for such further proceedings as may be proper.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT E.

(STATE OF WEST VIRGINIA,

At a Circuit Court for Kanawha County held at the Court House thereof on the 21st day of December, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Trustee*, and PAUL C. BEARDSLEE, *Trustee*.	)	

On the 8th day of December, 1936, this cause came on again to be further heard pursuant to the decree entered herein on the 2d day of December, 1936; and thereupon the following named parties tendered their several petitions for allowances herein, which are now ordered to be filed, namely:

(1) Petition of the Chase National Bank of the City of New York and Paul C. Beardslee, as trustees under Wayne United Gas Company first mortgage, dated June 1, 1929, for allowance of compensation for their services as such trustees.

(2) Petition of the law firms of Milbank, Tweed, Hope & Webb, and Brown, Jackson & Knight, as attorneys for the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, for allowance of compensation for their services as such attorneys, and for reimbursement of expenses paid by them.

(3) Petition of Ross B. Thomas and Herman Bennett, as receivers of Wayne United Gas Company, for allowance of compensation for their services as such receivers.

(4) Petition of the law firms of Koontz, Hurlbutt & Revercomb, and Brown, Jackson & Knight, as attorneys for Herman Bennett and Ross B. Thomas, Receivers of Wayne United Gas Company, for allowance of compensation for their services as such attorneys.

(5) Petition of H. Rummel Anderson and Thomas B. Jackson, as special commissioners appointed herein to make sale of the properties of the defendants company decreed to be sold, for allowance of compensation for their services as such special commissioners, and for reimbursement of expenses paid by them.

And all the petitions aforesaid having been fully considered by the Court, together with the arguments of counsel thereon, the Court is now of opinion to and doth hereby make the following allowances to said parties, respectively, to be taxed as costs herein and paid by said special commissioners out of the proceeds of sale of the properties of the defendant Wayne United Gas Company sold herein, in the manner hereinafter set out, namely:

(1) To the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, compensation for services	$ 3,250.00
(2) To the firms of Milbank, Tweed, Hope & Webb, and Brown, Jackson & Knight, attorneys, for services to said trustees	22,500.00

To Milbank, Tweed, Hope & Webb, for reimbursement of expenses paid by them		1,844.78
To Brown, Jackson & Knight, for reimbursement of expenses paid by them		613.18
(3) To Ross B. Thomas and Herman Bennett, Receivers, for compensation for their services		25,000.00
(4) To the firms of Koontz, Hurlbutt & Revercomb, and Brown, Jackson & Knight, attorneys, for services to said receivers		10,000.00
(5) To H. Rummel Anderson and Thomas B. Jackson, special commissioners, for compensation for their services		12,250.00
To said H. Rummel Anderson and Thomas B. Jackson, special commissioners, for reimbursement of expenses, as follows:		
Advertising sale	$1,065.20	
Stamps for deed, estimated	651.00	
Incidental, estimated	100.00	1,816.20
Total		$77,274.16

The several allowances above made, for services rendered by the receivers, by their attorneys, and by the special commissioners shall be divided equally between the respective parties entitled to said allowances, and so paid by the special commissioners; and the several allowances above made to the trustees and their attorneys for their services shall be paid to said respective parties jointly, and shall be divided among the persons entitled thereto in such manner as they shall agree.

And the Court doth now further find and decree that the above stated allowances shall be apportioned to and paid out of the proceeds of the sale of "Sale Parcel A" and "Sale Parcel B," respectively, of the properties sold by said special commissioners, as follows:

	Total	Parcel A	Parcel B
Trustees	$ 3,250.00	$ 3,250.00	$ 00
Counsel for trustees	22,500.00	22,500.00	00
Expenses of counsel	1,844.78	1,844.78	00
Do	613.18	613.18	00
Receivers	25,000.00	24,479.80	520.20
Counsel for receivers	10,000.00	9,791.90	208.10
Special Commissioners	12,250.00	11,995.10	254.90
Expenses of Commissioners	1,065.20	1,043.00	22.20
Do	651.00	651.00	00
Do	100.00	100.00	00
	$77,274.16	$76,268.76	$ 1,005.40

And it appearing that the sale price of the properties sold herein and designated as "Sale Parcel A" was $1,200,000.00, and that the several allowances and costs to be paid therefrom amount to the sum of $77,274.16, as above shown, the Court doth further find that the residue of said sale price, to-wit, the sum of $1,123,731.24, will be available for distribution to the respective holders of the first mortgage bonds of the Wayne United Gas Company; and it further appearing that the principal amount of said bonds outstanding is the sum of $1,464,000.00, the Court doth now further find and decree that the sum of $767.576 is the distributive amount payable upon each $1,000.00 face or par value of said bonds, (provided such bonds shall have attached thereto the unpaid interest coupon due on June 1, 1932, and all coupons due subsequent thereto), arising from

the proceeds of the mortgaged property sold herein as aforesaid. It is therefore adjudged, ordered and decreed that the purchaser of said property, or his assignees, be permitted to tender such first mortgage bonds of said Wayne United Gas Company, with coupons attached as aforesaid, in payment for said property in "Sale Parcel A" at the said rate of $767.576 per $1,000.00 face value, and that such bonds shall be received by said special commissioners in payment therefor at said rate as hereinbefore decreed.

And it appearing that the sale price of the properties sold herein and designated as "Sale Parcel B" was $25,500.00, and that the several allowances and costs to be paid therefrom amount to the sum of $1,005.40, as above shown, the Court doth further find that the residue of said sale price, to-wit, the sum of $24,494.60, will be available for distribution to the respective unsecured creditors of the Wayne United Gas Company and otherwise in the manner hereinbefore decreed.

And said special commissioners now reporting in open Court that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, as assignees of H. G. Phillips, the purchaser of all of said properties at the sale heretofore made, reported and confirmed herein, propose to tender to said special commissioners in payment for the properties designated as "Sale Parcel A" the first mortgage bonds of said Wayne United Gas Company in the principal amount of $1,350,000.00, and the interest coupons thereto attached as aforesaid, it is hereby further adjudged, ordered and decreed that said special commissioners be authorized to accept such bonds in payment of such purchase price, at the distributive value above found, namely, $767.576 per

$1,000.00 of par or face value, or a total value for said bonds of $1,036,227.60, and the residue of said price of $1,200,000.00, to-wit, the sum of $163,772.40, be collected by them in cash, together with the sum of $25,500.00 representing the purchase price of said "Sale Parcel B," after deducting the sum of $22,000.00 deposited with said special commissioners by the purchaser prior to sale; the respective amounts to be so collected by them hereunder being as follows:

$1,350,000 of first mortgage bonds, at distributive value herein found		$1,036,227.60
Cash, for payment of allowances and expenses herein allowed out of "Sale Parcel A"		76,268.76
Cash, for distribution to $114,000 of outstanding first mortgage bonds out of "Sale Parcel A"		87,503.64
Cash, for payment of allowances herein made for payment out of "Sale Parcel B"		1,005.40
Cash, for distribution to unsecured creditor out of "Sale Parcel B"		24,494.60
	1,225,500.00	
Less deposit	22,000.00	
		$1,203,500.00

Upon payment of said purchase price, in the manner above indicated, said special commissioners shall execute, acknowledge and deliver to the purchaser or his assignees the deed heretofore provided for, by said decree of December 2, 1936, and other decrees herein, and the receivers herein, Herman Bennett and Ross B. Thomas, shall pay

over to said purchaser or assignees all moneys then in their hands, and deliver to them the possession of all other properties of the Wayne Gas Company in their custody, possession or control, as heretofore decreed.

Said special commissioners shall endorse, stamp or print upon each bond tendered and received in payment as aforesaid, a credit of the distributive value of such bond, at the rate herein decreed.

Upon receipt of said purchase price and delivery of deed, said special commissioners shall forthwith pay out of the moneys received, the respective allowances made in this decree, to the several parties entitled thereto; and in case they shall find that the cost of stamps for deed and incidental expenses, as set out herein, are less than the respective amounts collected by them for the purpose, they shall repay the excess to the purchaser or his assignees from whom the same is received. Thereupon said special commissioners shall forthwith report to the Court the amount of moneys remaining in their hands, available to the first mortgage bondholders and to the other creditors of Wayne United Gas Company, respectively, for further order of the Court herein.

The written opinion of the Court, fixing the several allowances herein made, marked "Court's Memorandum on Petition for Allowance," is now ordered to be filed herein and made a part of the record.

The petitioners, The Bank of New York & Trust Company, Trustee, et als., and Wallace G. Berlin, et als., objected, and made their objection to the Court, to any disbursements of the funds now in, or to come into the hands of the Special receivers, and now in, or to come into, the hands of the special commissioners; and

The Wayne United Gas Company objected, and made its objection to the Court, to the allowances aforesaid, and each of them, and also objected, and made its objection to the Court, to any disbursements of the funds now in, or to come into, the hands of the special receivers, or now in, or to come into, the hands of the special commissioners, until after the proceedings pending in the federal courts (which proceedings are referred to in the stipulation dated October 14, 1936, and heretofore filed as part of the papers in this cause by an order of the Court) have been finally disposed of by the federal courts; and

The Wayne United Gas Company further objected to the provisions of the foregoing decree wherein the special commissioners named therein were thereby directed to make and deliver to the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company the deed as therein provided for; and

The Wayne United Gas Company moved the court to direct the said special receivers to defer and postpone the execution of such deed until the further order of the court; and

The Wayne United Gas Company further moved the court to defer and postpone all disbursements of the aforesaid moneys and the execution of the aforesaid deed until after the federal courts have finally passed upon the aforesaid proceedings pending therein.

And the court having heard the arguments of counsel upon said objections and said motions of the said The Bank of New York & Trust Company, et als., and Wallace G. Berlin, et als., and the Wayne United Gas Company is of opinion to over-rule the same.

It is therefore accordingly ADJUDGED, ORDERED and DECREED that said objections and said motions are,

and each is, hereby overruled, to which action of the court, in overruling such objections and motions, the said The Bank of New York & Trust Company, et als., Wallace G. Berlin, et als., and The Wayne United Gas Company, excepted.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 21st day of December, 1936.

(SEAL)

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(Authentication omitted in printing; same as certificates to Exhibit A, except dated December 21, 1936.)

EXHIBIT F.

Indenture dated the 17th day of December, 1936, between H. Rummel Anderson and Thomas B. Jackson, of Charleston, West Virginia, as Special Commissioners appointed in and by the decree of sale entered on July 13, 1934, in the Circuit Court of Kanawha County, West Virginia, in a cause therein pending entitled "John B. Bell and Commonwealth Gas Corporation, a corporation, Plaintiffs, v. Wayne United Gas Company, a corporation, The Chase National Bank of the City of New York, a corporation, Trustee, and Paul C. Beardslee, Trustee, et als., Defendants, in Chancery, No. 11,668," (hereinafter called the Special Commissioners), parties of the first part, The Chase National Bank of the City of New York, a national banking association organized and existing under the laws of the United States of America and Paul C. Beardslee of Westfield, New Jersey, as Trustees under a certain indenture (hereinafter called the First Mortgage) made by Wayne United Gas Company to Interstate Trust Company and Paul C. Beardslee, as Trustees (hereinafter called the Trustees), parties of the second part, Ross B. Thomas and Herman Bennett, as Special Receivers of Wayne United Gas Company and of all its property situated in the State of West Virginia (hereinafter called the Receivers), parties of the third part, H. G. Phillips, of Toledo, Ohio (hereinafter called the Bidder), party of the fourth part, and Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, corporations organized and existing under the laws of the State of Ohio (hereinafter called the Purchasers), parties of the fifth part.

(Text of deed omitted in printing; printed copy filed with original motion in Clerk's office.)

EXHIBIT G.

STATE OF WEST VIRGINIA:

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, May 21, 1935, the following order was made and entered, to-wit:

JOHN B. BELL, *et al*, Plaintiffs Below,

8056 vs.

WAYNE UNITED GAS COMPANY, *et al*, Defendants Below,

BANK OF NEW YORK & TRUST COMPANY, *Trustee, et al*, Appellants.

Upon an appeal from and supersedeas to a decree of the circuit court of Kanawha County, pronounced on the 13th day of July, 1934.

The court, having maturely considered the transcript of the record of the decree aforesaid, the exhibits therewith, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said decree, but not such as to require reversal of the entire decree. It is therefore adjudged, ordered and decreed that the decree of the circuit court of Kanawha County, pronounced in this cause on the 13th day of July, 1934, be and the same hereby is set aside, reversed and annulled, in so far and in so far only as it fails to determine whether or not there has been a breach by Owens-Illinois Glass Company, Libbey-Owens Sheet Glass Company and Libbey-Owens-Ford Glass Company of the gas purchase contract of June 5, 1929, referred to in this proceeding, and if so breached the amount of resultant damages; but that the said decree be and it hereby is affirmed with respect to all other matters complained of by the appellants, and that the appellants do pay to the appellees their costs about their defense in this court in this behalf expended. And this cause is remanded to the circuit court of Kanawha County with

directions on the present proof to amplify its decree to the extent of finding whether the said gas purchase contract of June 5, 1929, was in fact breached, and if so breached, the amount of resultant damages; and for further proceedings to be had therein according to the principles stated and directions given in the written opinion aforesaid, and further according to the rules and principles governing courts of equity; all of which is ordered to be certified to the circuit court of Kanawha County.

The decision of points in the foregoing cause, as the same appears from the syllabus and written opinion prepared by Judge Kenna, was concurred in by Judges Litz and Hatcher. Judges Maxwell and Woods dissented from so much of said opinion as affirms the finding of said circuit court that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company are the bona fide owners of the bonds purchased by them, and referred to in said decree. Judge Maxwell filed a dissenting memorandum concurred in by Judge Woods.

And at another day, to-wit, July 23, 1935, the following was made and entered:

* * *

* * *

8056 JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

* * *

* * *

* * *

Petitions for rehearing and re-argument having been filed in the six foregoing causes under the provisions of the rules of the court, it is ordered that said petitions be docketed and that the final judgments or decrees entered in said causes

at the January regular term be and they hereby are suspended until the further order of the court.

And at another day, to-wit, July 25, 1935, the following order was made and entered:

8056 JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

The Court, having maturely considered the petition for re-hearing and re-argument filed in the foregoing cause, the majority thereof is of opinion to and hereby doth deny the prayer of said petition, and doth order that the final decree entered in said cause at the January, 1935, term, be made absolute and be certified as heretofore directed. Thereupon the appellants moved the court to set aside this order and reconsider said petition for rehearing. Of which motion the court takes time to consider.

And at another day, to-wit, October 28, 1935, the following order was made and entered:

JOHN B. BELL, *et al*, Plaintiffs Below,

8056 vs.

WAYNE UNITED GAS COMPANY, *et al*, Defendants Below,

BANK OF NEW YORK & TRUST COMPANY, *Trustee, et al*, Appellants.

Upon an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 13th day of July, 1934.

The court, having maturely considered the motion of the appellants filed herein on the 25th day of July, 1935, to set aside the order entered on said date denying a rehearing in this cause, is of opinion to and doth hereby overrule said motion, and doth order that the order entered in this cause on the 21st day of May, 1935, be and the same hereby is made absolute, and that the same be certified as heretofore directed.

EXHIBIT H.

And at another day, to-wit, November 9, 1936, the following order was made and entered:

JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

This day came The Bank of New York & Trust Company, trustee, The Chemical Bank & Trust Company, Edward F. Moore, Commonwealth Gas Corporation, Wallace G. Berlin, Wert D. Brougher, Robert H. Conlyn, Anna A. Hays, Ellinor B. Hays, Katherine E. Morrison, Philip L. Morrison, Glenn E. Todd, Frances A. Waterhouse and Gertrude Hemler Tracy, by Blue, Dayton & Campbell and Price, Smith & Spilman, their attorneys, and presented to the court a petition praying for an appeal from and supersedeas to a decree of the circuit court of Kanawha County, pronounced on the 10th day of August, 1936, in a cause in which John B. Bell and another were plaintiffs, and said petitioners and others were defendants, with a record of the decree aforesaid accompanying the petition, which being seen and inspected by the court, the appeal and supersedeas prayed for is refused.

STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals, hereby certify that the foregoing are true copies of the orders of said Court entered on May 21, 1935, July 23, 1935, July 25, 1935, October 28, 1935, and November 9, 1936, respectively, in the cause of John B. Bell, et al, vs. Wayne United Gas Company, et al, No. 8056; which cause is reported in volume 116 of the West Virginia Reports, at page 280.

In Testimony Whereof, I have hereunto set my hand,

and affixed the seal of said Supreme Court of Appeals, this 30th day of December, 1936, and in the 74th year of the State.

(SEAL)

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

STATE OF WEST VIRGINIA, to-wit:

I, M. O. LITZ, Acting President of the Supreme Court of Appeals of the State of West Virginia, do hereby certify that Wm. B. Mathews is Clerk of said Court and was Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Charleston, West Virginia, this the 30th day of December, 1936, and in the 74th year of the State.

M. O. LITZ,
Acting President Supreme Court of Appeals.

STATE OF WEST VIRGINIA, to-wit:

I, WM. B. MATHEWS, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that Honorable M. O. Litz, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same, Acting President of the Supreme Court of Appeals of the State of West Virginia, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Charleston, in said State, this the 30th day of December, 1936, and in the 74th year of the State.

(SEAL)

WM. B. MATHEWS,
Clerk of the Supreme Court of Appeals of West Virginia.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, *Petitioner*,

vs.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, *Et Al.*

NOTE OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.

If the facts presented by this motion show that no ultimate relief can be realized by the petitioner, we assume that the Court will not proceed to determine the legal questions sought to be raised by the writ of certiorari. We understand that it is without jurisdiction to do so.

It appears from the record, and from the facts set out in the motion to dismiss, that the debtor company had been in receivership for more than three years prior to the filing of the petition in bankruptcy, and that proceedings to foreclose a first mortgage upon its property had been pending for practically the same period of time. Originally, two receivers were appointed upon application of creditors, but immediately the first mortgage trustees intervened, praying a foreclosure, and upon their motion one receiver was substituted as representing their interests. These proceedings were in the Circuit Court of Kanawha County, West Virginia, with an ancillary receivership in the State of Kentucky, where a small portion of the properties of the company are located—probably less than five per cent in value.

On July 13, 1934, a decree of sale was entered by the West Virginia court, adjudicating the amount of the first mortgage indebtedness, the other liens and debts in their proper order, decreeing payment, and directing sale of the properties by special commissioners. From that decree an appeal was taken by certain holders of junior liens. The Supreme Court of Appeals of West Virginia on May 21, 1935, reversed the decree of sale in so far only as it failed to determine in advance of the sale whether or not there had been a breach by the Glass Companies of a certain gas purchase contract between them and the debtor company. It remanded the cause to the Circuit Court with directions to determine this question, and in case a breach was found, to assess the resultant damages, and in all other respects the decree of sale was affirmed. (Exhibit G.) *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 181 S. E. 609. Upon remand, the Circuit Court found that there had been no breach of the contract, and no damages to be assessed. The same junior lienors applied to the Supreme Court of Appeals for an appeal from this finding, but the same was refused on November 9, 1936. (Exhibit H.)

After the decision of the Supreme Court of Appeals had become final, the present petition in bankruptcy under Section 77B was filed by the debtor company, and no further proceedings were taken in the State courts until the dismissal of the second appeal in the bankruptcy proceedings by the Circuit Court of Appeals. The two Glass Companies and others filed objections to the reorganization petition, and the same was finally dismissed without approval on May 28, 1936.

The order of the Circuit Court of Kanawha County finding that no breach of the gas purchase contract had occurred

was entered on August 10, 1936, and by that order the special commissioners appointed in the original decree of sale of July 13, 1934, were directed to proceed with the sale. (Exhibit A.) They advertised and held the sale on October 1, 1936, at which time the West Virginia properties were purchased by H. G. Phillipps, on behalf of the Glass Companies, for the sum of $1,225,500. Exceptions were filed to the report of sale and its confirmation, alleging three grounds: (1) the pendency of the present writ of certiorari in this Court; (2) the pendency of a petition to the Supreme Court of Appeals of West Virginia for an appeal from the order of August 10, 1936; and (3) that the sale price was inadequate. (Exhibits B, C and C-1.)

The Circuit Court did not act upon the report of sale until after the appeal from the order of August 10, 1936, had been refused by the Supreme Court of Appeals, but on December 2, 1936, it overruled the exceptions and confirmed the sale. No evidence as to the alleged inadequacy of price was offered, and the Court found that the price was fair and adequate. (Exhibit D.)

The Circuit Court on December 21, 1936, fixed the amounts of certain allowances to be paid out of the purchase money (Exhibit E), and on that date the Glass Companies, as assignees of the purchaser, paid the full purchase price and accepted from the special commissioners a deed of conveyance for all the West Virginia properties, and have taken possession of the same. (Exhibit F.) The Wayne United Gas Company and certain junior lienors at that time objected to the payment of the allowances and the delivery of the deed until the bankruptcy proceedings were terminated.

I.

The properties of the debtor company having been sold, and title having become vested in the purchasers, no reorganization under Section 77B of the Bankruptcy Act is possible, and the case is moot.

The plan of reorganization proposed by the debtor is based upon the retention of its properties by the debtor or by a new company to be created, and it is obvious that without the properties no reorganization could be had. These properties were subject to a first mortgage of far greater amount than the value of the properties, as found by the district court, and as proven by foreclosure sale. Suit for foreclosure of the first mortgage had been pending for more than three years when the petition in bankruptcy was filed. No steps were taken to enjoin or stay proceedings in that suit, and in due course the sale was made and confirmed, and title to the properties vested in the purchasers.

First mortgage bonds in the principal amount of $1,350,000 (92% of those outstanding) were held by the Glass Companies, which became the purchasers of the properties, and their bonds were used in making the purchase, at their distributive value as found in the suit, and have been cancelled to that extent and so endorsed.

We submit that in this situation the entire object of the bankruptcy proceeding must necessarily fail, that no plan of reorganization can be effective, and that no relief can ultimately be granted the petitioner, no matter what view the Court may take of the legal questions sought to be raised upon the present writ. The Court can not be asked to decide such legal questions in the abstract, when it is plain that no real interest of the petitioner can be served thereby.

The principle upon which we rely has been well stated by this Court in *Mills v. Green*, 159 U. S. 651, in the following language:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

In the case cited, the Court discusses the principle and illustrates it by numerous citations. The same rule has been adhered to uniformly, as the Court pointed out in the later case of *American Book Co. v. Kansas*, 193 U. S. 49. Typical illustrations of the principle are the cases where by change of conditions, lapse of time, expiration of terms of office, and the like, it is no longer possible for the court to give effective relief. In the *Mills* case, the plaintiffs sought the right to vote at an election, and the election was held pending the suit. In the *American Book Company* case, the appellant had complied with the decree complained of, which left no actual controversy pending. In *Maloney v. Condon*, 189 U. S. 64, the controversy involved title to an office, and the term expired pending suit. It was there urged that the questions involved were of public importance and should

be decided, but the Court dismissed the writ of error, saying:

> "If we were to hold that the act could be subjected to the test of the 14th Amendment, and that it could not stand that test, we should do nothing more than reverse the decree below and remand the cause, and, as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject."

A case may be moot for a variety of reasons. It is said in *Ex parte Steele*, 163 Fed. 694, 701:

> "It is universally understood by the bench and bar * * * that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."

The present case falls within the last mentioned category, and any judgment hereafter rendered by any court in the bankruptcy proceedings would be, as said by the court in *State v. Lambert*, 52 W. Va. 248, "wholly barren of practical or substantial results." This Court said as recently as *Brownlow v. Schwartz*, 261 U. S. 216: "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate." In that opinion a great number of the authorities are cited. There is a full discussion of moot cases also in chapter 32 of Robertson & Kirkham, Jurisdiction of the Supreme Court, where it is said:

> "In determining whether a cause is moot the test is whether, at all stages of the litigation, there is 'an actual controversy, and adverse interests,' capable of being acted upon by a judgment which can be carried into effect. The fact that the proceeding is an amicable one does not preclude the existence of a real dispute between the parties concerning some matter of right; * * * . But where there is no real dispute between the plaintiff and defendant, either because the suit is seen to have been collusive from its inception, or through subsequent events the controversy has been extinguished or the cause of action has ceased to exist; or where the questions sought to be reviewed are wholly abstract, or the happening of events has rendered it impossible for the Court to grant any effectual relief, the cause must be treated as moot." (Sec. 248.)

It has been said that the lack of jurisdiction of this Court to decide moot questions is constitutional, and that its jurisdiction extends only to "cases" or "controversies" between actual parties litigant, where the Court can grant effective relief. No other kind of controversy can call forth the exercise of the judicial power. See, on this point:

> *United States v. Alaska S. S. Co.*, 253 U. S. 113.
> *California v. San Pablo & T. R. Co.*, 149 U. S. 308.
> *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274.
> *Swift & Co. v. United States*, 276 U. S. 311.
> *Fairchild v. Hughes*, 258 U. S. 126.
> *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447.

The filing of the petition for reorganization did not, of itself, divest the State court of jurisdiction to proceed with

the sale of the debtor's properties under its mortgage. Receivers were in possession pending foreclosure and the decree of sale had been entered more than a year before the bankruptcy petition was filed. Under general bankruptcy law, clearly the jurisdiction of the State court was not ousted. See *Straton v. New*, 283 U. S. 318, and note in 75 U. S. L. Ed. 1078. And this is true where the State court is proceeding to enforce a specific lien under a cross-bill brought by the mortgagee. *In re Dayton Coal & Iron Co.*, 291 Fed. 390.

While the bankruptcy court, by express provisions of Section 77B, may stay judicial proceedings to foreclose liens, this is only *after approval* of the petition. And the provision is not self-executing; the stay does not follow automatically upon the approval. *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216; *In re Murel Holding Corporation*, 75 F. (2d) 941. Therefore, since no stay was asked or granted, the jurisdiction of the State court continued, and the assets of the debtor having been properly disposed of by that Court, there is nothing in existence upon which the debtor can base a reorganization.

Finality of Proceedings in the State Court. Our motion shows that under the West Virginia statutes a discretionary appeal may be obtained upon petition filed within eight months from the date of any final or appealable decree. The original decree of sale adjudicated the principles of the cause and constituted the authority for the sale finally made. It was entered on July 13, 1934, and was appealed from and affirmed, except in the single respect above noted (requiring a finding as to whether the gas sales contract had been breached). The supplemental decree of sale was en-

tered on August 10, 1936, and a petition for appeal therefrom was presented to the appellate court and refused. The only open question involved in that decree was as to whether or not there had been a breach of the gas sales contract. A petition for appeal may again be presented within the eight months period, but the question has been once passed upon by the Supreme Court of Appeals.

The decree confirming the sale was entered on December 2, 1936, and at the date of this memorandum no appeal therefrom has been asked for, nor has any party requested a suspension or stay of the order, or of the direction to the special commissioners to collect the purchase money and deliver deed for the properties. No grounds for appeal from the decree of confirmation can be perceived, as the sale was fairly made and the price is admittedly fair and adequate; at least, no evidence was offered to the contrary.

There is, then, only the bare legal possibility that any of the proceedings in the State court since the first appeal may be reversed if appropriate appellate action is taken in the future. The decree of July 13, 1934, however, adjudicating the mortgage indebtedness and directing sale of the properties, is in law a finality. When that decree was affirmed, there was no longer any possibility of a reorganization of the debtor based upon ownership of the properties, and this is now emphasized by the actual passing of title from the Gas Company. It seems to us that this Court must act upon the facts as it finds them at this time. If the appellant would present any changed condition to the Court, it must first accomplish the change. Title to the properties formerly owned by the Wayne United Gas Company is now vested in others. As the case stands today, all

possibility of a reorganization of the company has vanished. To continue litigation with a view to reorganization is wholly futile.

We respectfully submit that the writ of certiorari should be dismissed.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, Respondents.

January 4 1937.

CHRONOLOGY OF PROCEEDINGS

1934

July 13 Decree of sale, adjudicating indebtedness and decreeing payment.

1935

May 21 Reversal of decree of sale, in part, by Supreme Court of Appeals.

July 25 Rehearing refused, but motion made for reconsideration.

Oct. 28 Order of Supreme Court of Appeals became final.

Nov. 25 Bankruptcy petition filed by debtor.

1936

Mch. 2 Petitions dismissed.

Apr. 15 Appeal (Sec. 24b) denied by C.C.A.

Apr. 24 Petition for rehearing filed in District Court.

May 12 Rehearing granted.

May 28 Petitions again dismissed.

June 11 Appeal taken (Sec. 25a).

July 4 Appeal dismissed by C.C.A.

Bankruptcy proceedings. (No action in State court.)

July 28 Hearing in Circuit Court of Kanawha County on mandate.

Aug. 10 Order of Circuit Court finding no breach of contract, and directing sale under decree of July 13, 1934.

Aug. 22 Petition for certiorari filed in bankruptcy suit.

Oct. 1 Property sold under decree.

Oct. 12 Certiorari granted by Supreme Court in bankruptcy suit.

Nov. 9 Appeal from Circuit Court order of August 10th, refused by Supreme Court of Appeals of West Virginia.

Dec. 2 Sale confirmed by Circuit Court.

Dec. 21 Allowances determined, purchase price paid, and deed delivered for properties.

SUPREME COURT OF THE UNITED STATES.

No. 305.—October Term, 1936.

Wayne United Gas Company, Petitioner, *vs.* Owens-Illinois Glass Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has decided that a District Court is without power to set aside its order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act and to rehear the cause after the expiration of the period allowed by the Act for appeal from the order.[1] To resolve a conflict of decision[2] we granted certiorari.

November 25, 1935, the petitioner filed in the District Court for Southern West Virginia a petition and, on December 10th, an amended and supplemental petition for corporate reorganization under Section 77B of the Bankruptcy Act as amended.[3] February 7, 1936, the respondents filed objections and motions to dismiss. March 2nd the petitions were dismissed. March 20th the petitioner presented to the Circuit Court of Appeals a petition for appeal, pursuant to Section 24 (b) of the Bankruptcy Act.[4] April 15th the court denied the appeal,[5] holding that the petitioner should have proceeded under Section 25 (a).[6] April 17th petitioner notified respondents that on April 24th it would present a petition to the District Court praying vacation of the order of March 2nd and

[1] 84 F. (2d) 965.

[2] See *West* v. *McLaughlin's Trustee*, 162 Fed. 124; *Cameron* v. *National Surety Co.*, 272 Fed. 874. This court has adverted to the question without deciding it. *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 146.

[3] Act of June 7, 1934, 48 Stat. 911; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; 11 U. S. C. Sec. 207.

[4] Act of July 1, 1898, c. 541, Sec. 24 (b), 30 Stat. 553; 11 U. S. C. Sec. 47.

[5] *Wayne United Gas Co.* v. *Owens*, 83 F. (2d) 98. See *O'Connor* v. *Mills*, No. 442, decided this day.

[6] Act of July 1, 1898, c. 541, Sec. 25 (a), 30 Stat. 553, 11 U. S. C. Sec. 48 (a).

a rehearing and review of all matters arising in the proceedings because of errors committed by the court in dismissing its petitions, and that, upon rehearing, the court would be asked to enter an order approving the original and amended petitions. After presentation of the petition for rehearing and argument thereon the court directed that it be filed, took the matter under advisement, and, on May 12th, set aside the order of March 2nd, granted a rehearing and review and fixed May 22nd for a hearing on all questions arising on the record. The court found that good cause existed justifying vacation of its previous order and reconsideration of the cause. It further found that the application had been seasonably presented and no rights had vested under the order of March 2nd which would be disturbed by setting the order aside. By leave of court the petitioner, on May 22nd, presented a second amended and supplemental petition, which incorporated the earlier petitions for reorganization, and asked the court to find that the original and supplemental petitions were filed in good faith and complied with Section 77B. The respondents objected. May 28th the court, after a hearing, sustained the respondents' objections and dismissed the petitions for reasons set forth in findings of fact and conclusions of law. June 11th petitioner's application to the judge of the District Court, under Section 25 (a) of the Act, for an appeal, with supersedeas, was granted. The Circuit Court of Appeals, on respondents' motion, dismissed the appeal.

1. The respondents have moved to dismiss the writ of certiorari on the ground that the controversy has become moot. In support of the motion they show that for some time prior to the institution of the 77B proceedings the debtor's property had been in possession of a receiver appointed by a state court; that the trustee of a first mortgage had intervened in the receivership proceeding and sought foreclosure; that the state court had ordered a sale of all the debtor's property and the decree of sale had become final before the presentation of the petition for reorganization. They show that subsequent to the order of March 2nd dismissing the petition for reorganization further action by the state court resulted in the confirmation of a commissioner's sale, payment of the purchase price partly in cash and partly in first mortgage bonds of the debtor and execution and delivery of a deed to the purchaser, a nominee of respondents. It appears not only that the respondents were parties

to the 77 B proceeding but that, prior to the consummation of the sale, the state court was fully advised of the steps taken in the federal courts and of the pendency of the petition for certiorari in this court to review the order of the Circuit Court of Appeals dismissing the appeal.

The respondents went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the state court suit as precluding further consideration of the petition for reorganization. The motion must accordingly be overruled.

2. The petitioner asserts that the grant or refusal of a rehearing rested in the sound discretion of the District Court and since in the proper exercise of that discretion the court entertained the application and reheard the case upon the merits, its action again dismissing the petition for reorganization was a final order and the appeal therefrom was timely. The respondents contend that the first order of dismissal having terminated the cause, and the thirty days allowed by the bankruptcy act for appeal from the order having expired, the District Court was without power to entertain a petition for rehearing and its second order of dismissal was a nullity. Wherefore they say the appeal taken more than thirty days from the date of the original order of March 2, 1936, if considered as challenging that order, was out of time, and the motion to dismiss was properly granted by the Circuit Court of Appeals. We hold the petitioner's position is sound and the appeal should have been entertained.

Though a court of bankruptcy sits continuously and has no terms,[7] respondents urge that, as courts of bankruptcy are courts of equity, the rules applicable to the rehearing of a suit in equity should be applied in bankruptcy cases, and as it appears the term of the District Court expired April 20, 1936, the court had lost its power to disturb the order of March 2nd. A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after

[7] *Sandusky* v. *National Bank*, 23 Wall. 289, 293; *In re Lemmon & Gale Co.*, 112 Fed. 296, 300; *Freed* v. *Central Trust Co.*, 215 Fed. 873, 876; *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 26.

an appeal has been perfected and after the time for appeal has expired, but not after expiration of the term at which the decree was entered.[8] It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended.

In the alternative the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a fresh order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected.[9] There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal.[10] A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to

[8] Equity rule 69; *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 36; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Zimmern* v. *United States*, 298 U. S. 167.

[9] *United States* v. *Mayer*, 235 U. S. 55; *United States* v. *Benz*, 282 U. S. 304; and cases cited in Note 8.

[10] *Brockett* v. *Brockett*, 2 How. 238; *Steines* v. *Franklin County*, 14 Wall. 15; *Hardin* v. *Boyd*, 113 U. S. 756; *Boesch* v. *Gräff*, 133 U. S. 697; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120.

entertain it, does not extend the time for appeal.[11] Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed.[12] The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry.[13] The District Court's action conformed to these conditions. Two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order of March 2, 1936, petitioner notified respondents of its intention to apply for rehearing. Prompt application was made and the cause was promptly heard. A supplemental petition was presented and entered upon the files by leave of court. The original, the amended, and the supplemental petition were considered upon the merits, and the court made findings and announced conclusions of law with respect thereto. There is no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. The court found that no rights had intervened which would render it inequitable to reconsider the merits. There was no abuse of sound discretion in granting the motion and reconsidering the cause.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

So ordered.

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[11] *Roemer* v. *Bernheim*, 132 U. S. 103, 106; *Morse* v. *United States*, 270 U. S. 151, 154; *Clarke* v. *Hot Springs Elec. L. & P. Co.*, 76 F. (2d) 918, 921.

[12] *In re Stearns & White Co.*, 295 Fed. 833; *Bonner* v. *Potterf*, 47 F. (2d) 852, 855; *United States* v. *East*, 80 F. (2d) 134, 135.

[13] Compare *Aspen Mining Co.* v. *Billings*, *supra*, p. 37; *Voorhees* v. *Noye Mfg. Co.*, *supra*, p. 137; *Citizens Bank* v. *Opperman*, 249 U. S. 448, 450; *Morse* v. *United States*, *supra*, p. 154.